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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

72-1708

VIVIEN KELLEMS, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provisions and Statute Involved	2
Statement	2
Reasons for Granting the Writ	5
Conclusion	24
Appendix	1a
Tax Court Opinion	1a
Court of Appeals Opinion	7a
Judgment	8a
Denial of Petition for Rehearing	9a
Constitutional Provisions and Statute Involved	10a

INDEX OF CITATIONS

Cases:

Burnet v. *Wells*, 289 U.S. 670 (1933) 21
Eisenstadt v. *Baird*, 405 U.S. 438 (1972) 21
Faraco v. *Commissioner*, 261 F. 2d. 387 (CA 4, 1958) cert. den. 359 U.S. 925 (1959) 13, 14, 22
Hartford S.B.I. & Ins. Co. v. *Harrison*, 301 U.S. 459 (1937) 21
Heiner v. *Donnan*, 285 U.S. 312 (1932) 14
Hoeper v. *Tax Commission*, 284 U.S. 206 (1931) ..5, 7, 9, 21
John Hancock Mutual Life Insurance Company v. *Helvering*, 128 F. 2d. 745, 29 AFTR 711 (CA, D.C. 1942) 18
Moritz v. *Commissioner*, 469 F. 2d. 466 (1972) cert. den. May 21, 1973 .....5, 7, 9, 13, 14, 15, 21
O'Malley v. *Woodrough*, 307 U.S. 277 (1939) 5, 8, 9, 21
Poe v. *Seaborn*, 282 U.S. 101 (1930) 10

Page

Railway Express Agency v. *New York*, 336 U.S. 106 (1949) 21
Reed v. *Reed*, 404 U.S. 71 (1971) 7
Savings & Loan Association v. *Topeka*, 87 U.S. 655 (1875) 6
Wilcox v. *Penn Mutual Life Insurance Company*, 38 AFTR 704, 357 Pa. 581, 55 A.2d. 521 (1947) 10

STATUTES:

Internal Revenue Code of 1954, as amended to 1965:
Sec. 1(a)(2) 3
Sec. 2(a) 3

Constitution of the United States:
Fifth Amendment 2, 13, 22, 23
Ninth Amendment 2, 22, 23
Fourteenth Amendment 2, 22, 23
Sixteenth Amendment 2, 4, 8, 11, 14, 20, 22, 23
Article 1, Section 2, Clause 3 .....2, 22, 23
Article 1, Section 9, Clause 4 .....2, 22, 23

STATEMENTS OF:

President Truman 15
Senator Paul Douglas 16
Assistant Secretary of the Treasury Cohen 16
Randolph Paul 6, 16, 19
Congressman Eberharter 17
Congressman Sabath 17
Speaker of the House McCormack 17

MISCELLANEOUS:

Indiana Legal Forum, Volume 4 (1970) 19
The Rape of the Taxpayer, Stern (Random House, 1973) 18

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Vivien Kellems, by her counsel, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Tax Court (Appendix, *infra,* pp. 1a-7a) is reported at 58 TC 556. The opinion of the Court of Appeals is not yet reported, but is printed in the Appendix, *infra,* p. 7a.

JURISDICTION

The *per curiam* opinion of the Court of Appeals was entered on April 4, 1973. Judgment of the Court of Appeals was entered on April 4, 1973 and petition for rehearing was denied on May 1, 1973 (App., *infra*, pp. 8a-9a). The jurisdiction of this Court is invoked under 28 USC 1254.

QUESTION PRESENTED

Whether a 41.7 percent penalty tax in the amount of $3,158.08 for 1965 imposed under the Internal Revenue Code against the 77 year old petitioner *solely because she was not married* constitutes the taking of her property without due process of law and denial of equal protection of law in violation of the Fifth, Ninth, Fourteenth and Sixteenth Amendments to the Constitution and constitutes the imposition of direct penalty tax on status in violation of those Amendments and Article 1, Section 2, Clause 3 and Article 1, Section 9, Clause 4 of the Constitution?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

See Appendix, *infra*, pp. 10a-12a.

STATEMENT

Petitioner is a 77 year old single woman residing in East Haddam, Connecticut. She was not married at any time from 1947 through 1965 (Tr. 13).[1] Solely because she was single in 1965 a penalty tax in the amount of $2,939.13 was imposed against her as additional 1965 income tax (App., *infra*, pp. 2a-3a. This

[1] "Tr." references are to transcript of Tax Court hearing.

penalty for not having a marital status was increased to $3,158.08 under the Tax Court's decision (App., *infra*, p. 3a).

Petitioner filed timely claim for refund of the 1965 penalty exacted from her. The ground for her claim was that the penalty was illegally imposed in violation of the Constitution. Respondent denied the claim for refund on the ground that "only the courts have authority to pass on" constitutionality of Revenue Acts (Stipulation pars. 5, 6 and Exs. 2-B and 3-C).

Prior to 1948 tax was imposed equally upon taxable income owned by individual taxpayers regardless of whether they were married or single. In 1948, however, the Congress, over the President's veto, enacted the *fictitious* splitting device whereby a person having a marital status is permitted to reduce net taxable income by one-half and pay twice the combined normal and surtax that would be payable in the lower income tax brackets attributable to only one half of the income. Thus, the married taxpayer is permitted to avoid the higher income tax brackets while retaining full ownership of the income (IRC Secs. 1(a)(2) and 2(a), App., *infra*, pp. 11a-12a and Stip. Par. 9).

The income splitting device privilege is denied to all taxpayers having an unmarried status, except that since 1963 widows and widowers have been allowed the privilege while single for two years after death of husband or wife.[2] Consequently, with the exception of those who are single for only two years resulting

[2] The two additional years' benefit of the splitting device was granted by amendment to IRC Section 2(a) effective for taxable years beginning after December 31, 1933. See Section 131 of Public Law 88-272, Feb. 26, 1964.

from death, the income of those having a single status has since 1948 been taxed in the highest income tax brackets (Stip. Par. 9, Petition to Tax Court, pp. 6-13). The failure to extend the splitting device privilege to those having a single status has resulted in an annual penalty against them, payable solely because they are not married, amounting up to more than 40 percent above the tax imposed on those having a marital status with identical taxable income (App., *infra*, p. 3a).

The splitting device in 1969, for example, resulted in the shifting of approximately $17.1 billion dollars of liability for revenue in that year from those most able to pay to low income married taxpayers, to single taxpayers, and to the Public Debt (Stip. Par. 9 and Exs. 6 and 7). As a consequence, when the annual loss of revenue is taken into account from 1948 to date, along with the interest carrying charge on the resulting increased National Debt, it is reliably estimated that more than 75 percent of the entire National Debt today is attributable to the splitting device.

During the brief testimony which the Tax Court permitted petitioner, she sought to explain the basis of her position that the penalty imposed against her is "arbitrary, unfair and unconstitutional." She particularly pointed out the fact that there are at least six million more single women than there are single men in this country, leaving women penalized for their single status when faced with the impossibility of marriage (Tr. 15-16). Her testimony was abruptly terminated by the presiding Judge as constituting "legal argument" when she made the simple statement of fact that the Sixteenth Amendment authorizes the taxing of income and not people (Tr. 16).

Since 1948 the penalty tax exacted from Miss Kellems because she had no husband has been in excess of $90,000.00, inclusive of interest (Ex. 5).

The Tax Court sustained the disallowance of petitioner's claim for refund holding that the Constitution of the United States affords no protection against imposing the 41.7 percent penalty against her for being unmarried (App., *infra*, p. 1a). In a *per curiam* opinion a panel of the United States Court of Appeals for the Second Circuit affirmed the Tax Court's decision (App., *infra*, p. 7a).

REASONS FOR GRANTING THE WRIT

The decision of the Second Circuit in this case is (1) in direct violation of this Court's opinion in *Hoeper* v. *Tax Commission*, 284 U.S. 206 (1931), (2) in direct conflict with the Tenth Circuit's opinion in *Moritz* v. *Commissioner*, 469 F. 2d. 466 (1972), cert. denied May 21, 1973, and (3) contrary to the guidelines carefully spelled out by this Court in *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939).

Equally important, the splitting device in the Internal Revenue Code penalizing this petitioner for being single has done irreparable harm to all unmarried taxpayers, to all low income taxpayers, and to the United States by accounting for more than 75 percent of its National Debt. The splitting device has aptly been described as a legalized fraud for the benefit of the wealthy while contributing heavily to the burden, distress and turmoil among our disadvantaged citizens. It is also a major factor in the economic difficulties of the United States at home and abroad and has done more harm to minority citizens than any legislation enacted in this century.

The splitting device has severely impaired the income tax system through loss of uniformity and effective progression in the tax rates imposed by the Internal Revenue Code. This impairment has been so great that abandonment of the income tax has been threatened with consideration being given to adopting a national sales tax known as a value added tax.[3]

Further, the Courts below have, to an unprecedented extent, displayed bias and hostility to the constitutional issue presented. This is understandable when it is realized that the splitting device has shifted more than $300 billion dollars to the wealthiest married taxpayers in America and has provided maximum benefit at Congressional and top Federal salary levels. These circumstances make it imperative for this Court to exercise its supervisory powers so that the Constitution and our Federal judicial system may properly function to protect a helpless minority against powerful forces of human greed and avarice.

The underlying nature of the splitting device was explained by this Court nearly a century ago in *Savings & Loan Association* v. *Topeka*, 87 U.S. 655 (1875), as follows:

> "Of all the powers conferred upon government that of taxation is most liable to abuse. * * * This power can * * * readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other * * *.
>
> "To lay, with one hand, the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals * * *

[3] See statement, *infra*, of Randolph Paul, late General Counsel of the Treasury Department.

is none the less a robbery because it is done under the forms of law and is called taxation." (Italics supplied).

In *Hoeper* v. *Tax Commission, supra,* this Court, without ambiguity, squarely held that the married or single "status of one receiving income" does not "justify a different measure for the tax."

The Tenth Circuit, in *Moritz* v. *Commissioner, supra,* without ambiguity, stated the question presented and its decision as follows: "Whether denial of the deduction solely to a man who has never married * * * was arbitrary, irrational and the denial of due process. * * * We conclude that the classification is an invidious discrimination and invalid under due process principles." The Tenth Circuit proceeded to order that "the benefit of the deduction generally provided by the statute should be extended to the taxpayer" who had never been married.[4]

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[4] The untenable position of the Government in attempting to treat *Moritz* on certiorari as a "sex" case is obvious when it is realized that the only way the male taxpayer could have become entitled to equal treatment under the statute would have been to acquire a marital status. The Tenth Circuit was obviously reaching for the shelter of *Reed* v. *Reed*, 404 U.S. 71 (1971) when it spoke of the classification as being premised "primarily on sex" although as to Mr. Moritz it was based solely on his lack of marital status. The Second Circuit apparently treated this as an excuse for designating the *Moritz* decision as "inapposite" even though the only step open to Mr. Moritz to bring himself within the classification for equal treatment was to acquire a marital status just as that was the only step open to Miss Kellems. The Second Circuit ignored the fact that Miss Kellems' case does come within the principle of *Reed* v. *Reed, supra,* because of the fact that there are at least six million women in America penalized for being single when faced with the impossibility of acquiring a marital status (Tr. 16).

Guidelines that should be followed in this case were carefully spelled out by Mr. Justice Frankfurter, speaking for the Supreme Court in *O'Malley* v. *Woodrough, supra,* approving imposition of income tax against salaries of federal judges. This Court was careful to point out that it was approving a tax against the salaries of federal judges that applied equally to "every one else within defined *classes of income* * * *." Justice Frankfurter then went on to state that "Congress has committed itself to the position that a *non-discriminatory* tax laid generally on *net income* is not, when applied to the *income* of a federal judge, a diminution of his salary within the provisions of Article 3, § 1 of the Constitution." Thus the guidelines are perfectly plain:

First, this Court only approved a tax that applied against *net taxable income* as authorized by the Sixteenth Amendment and *did not approve a tax against judges or their status.*

Second, this Court was careful to make it equally plain that the approved *tax on income was non-discriminatory.*

The petitioner's plea in this case is that guidelines identical to those approved for the taxation of the salary of federal judges be applied in the taxation of her income, namely, that a *non-discriminatory* tax be imposed on the basis of her taxable income and not on the basis of her married or single status. It is unthinkable that the Supreme Court in the *O'Malley* case would have approved the imposition of a tax against the salaries of federal judges if the imposing act had provided for taxing them at 40 percent higher rates depending upon their married or single status.

The Second Circuit misapprehended the constitutional issue involved. This is apparent from the fact that the Court ignored the *Hoeper, Moritz* and *O'Malley* cases during oral argument just as though they did not exist and stated its position as follows:

1. That the discrimination against petitioner because she had no husband was no more invidious than the plight of those who did not have sufficient wealth to realize the benefit of tax exempt bond interest or capital gains taxation.

2. That all of the states could have replaced English common law property rights with the Spanish community property system and thereby could have brought about heavy discrimination against the single taxpayer just as was accomplished by Congress through the fictitious splitting device.

3. That historically courts do not interfere with tax statutes.

In seeking to equate the issue in this case with tax exempt bond interest and capital gains taxation, the Court was clearly confusing the constitutional issue with a redistribution of wealth problem. Unlike the splitting device for the benefit of married taxpayers only, *all* taxpayers are entitled to benefit from tax exempt interest and capital gains. In order for exempt interest and capital gains to be comparable to Miss Kellems' situation, the Internal Revenue Code would have to provide that interest exemption and capital gains taxation are available only to those having a marital status and not available to Miss Kellems and other unmarried individuals. Because there is no discrimination in the exempt interest and capital gains

benefit, there is no violation of due process or equal protection principles.

During oral argument the Second Circuit was obsessed with the hypothetical question as to what would have been the situation if every state in the union had abolished English common law property rights and adopted the rules of the few states following the Spanish community property system. Such a flight of fancy, so completely out of touch with reality, has no bearing on the constitutional issue in this case. Emphatically, we have no quarrel with the Supreme Court's opinion in *Poe* v. *Seaborn*, 282 U.S. 101 (1930) dealing with *vested* property rights under the community property law of the state of Washington. All arguments seeking to justify the penalty tax against the unmarried taxpayer on the basis of community property law as dealt with in *Poe* v. *Seaborn, supra*, is a testimonial to one of the most cunning propaganda efforts ever put forth in America which misled the Congress in 1948 and which is still utilized to this day to obscure the true nature of the constitutional issue presented in this case.

It is inconceivable that all common law states would have repealed their property laws and adopted the Spanish community concept regardless of the specious propaganda emanating from those who lobbied the splitting device through the Congress over the President's veto in 1948. It is questionable whether the common law states could have so disrupted their vested property rights without running afoul of constitutional restrictions. See the 1947 opinion of the Supreme Court of Pennsylvania in *Wilcox* v. *Penn Mutual Life Insurance Company*, 38 AFTR 704, 357 Pa. 581, 55 A.2d 521, promptly holding the newly enacted Pennsyl-

vania community property law invalid a year before the splitting device was lobbied into the Federal income tax laws.

However, in response to the Second Circuit's hypothetical question, we have no complaint against taxation of income at *equal rates* to its *vested* owner who has dominion and control over handling and spending or other disposition of the funds. It is the penalty tax on single taxpayers resulting from the *fictitious* (repeat *fictitious*) splitting device in the Internal Revenue Code that allows the income of married taxpayers only, on a discriminatory basis, in both *common law and community property states* to be divided in half in order to avoid the high tax brackets for the married taxpayer, *with ownership of all income remaining unchanged*, that we maintain (a) is not authorized by the Sixteenth Amendment and (b) is unfair and in violation of constitutional protection of the unmarried taxpayer. We respectfully urge that under the terms of the Sixteenth Amendment and due process and equal protection principles, the single taxpayer should be taxed on *taxable net income* at the same rate as married taxpayers, i.e., the single taxpayer is entitled to the benefit of the fictitious splitting device.

There is clearly no obstacle preventing equal treatment for all unmarried taxpayers. The Tax Court's assertion of Congressional inability to provide equal treatment under the splitting device for individual taxpayers is sheer nonsense as shown by the following:

(a) Congress provided partial relief for unmarried heads of household and clearly could have provided full relief for all single taxpayers.

(b) Congress provided full relief for widows and widowers for two years after the death of the husband or wife and clearly could have provided that same full relief for all years for all unmarried taxpayers.

(c) Congress in the Revenue Act of 1969 provided approximately 50 percent relief to those in high income brackets having an unmarried status and obviously could have provided 100 percent relief to all single taxpayers.

The Second Circuit's supposititious thought that the splitting device is justified because the states might have brought about discrimination against the single taxpayer by abandoning the English common law and adopting the Spanish community system is invalid for two reasons, namely, (1) the suggestion that the English common law property rights would have been abandoned is unrealistic and (2) even if the states could or would have overridden Federal law and brought about invidious discrimination against the single taxpayer that would be *no justification for the Congress beating them to it by enacting discriminatory laws against the single taxpayer in violation of the Constitution.*[5]

Unfortunately and mistakenly, the Second Circuit took the position during oral argument that "historically" Courts do not interfere with tax statutes. This

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[5] Actually, the fictitious splitting device was in some instances even more of a boon to the wealthy married taxpayer in community property states than in common law states. This is because under the fictitious splitting device the wealthy wife no longer was required to report one-half of her husband's earnings as her income, but instead, was allowed to treat one-half of her income from premarital estate as though it were her husband's for tax purposes.

went even further than the Tax Court's statement that the "concept of equal protection has been held in certain *nontax* situations to be applicable to the United States through the Fifth Amendment" (App., *infra*, p. 3a). This view as to alleged immunity of "tax situations" from constitutional protection was obviously grounded on the principle that the King can do no wrong—overlooking the fact that we have a Constitution, not a King—and on *Faraco* v. *Commissioner*, 261 F. 2d. 387 (CA 4, 1958) cert. den. 359 U.S. 925 (1959) which was not cited or mentioned below. In *Faraco* the Fourth Circuit held to be "slight" a 40.37 percent annual penalty against Mrs. Faraco because her husband died and concluded as follows:

> "* * * The fact that the change gave a proportionately greater tax reduction to married couples with large incomes is wholly irrelevant; if the rapid acceleration of the progressive tax rates ran afoul of no constitutional guaranty, a slight withdrawal may not be said to have done so."

It is clear that the Fourth Circuit and now the Second Circuit, in direct conflict with the Tenth Circuit in the *Moritz* case, *supra*, have taken the view that inequality in taxation is "wholly irrelevant". The crux of the position in both the *Faraco* case and the instant *Kellems* case is that high rates applied *equally* to all taxpayers, married and single alike, may be *unequally* withdrawn in favor of wealthy married taxpayers, leaving single taxpayers with no constitutional protection from heavy tax penalties against them. If this *non sequitur* is sound it would be quite simple to avoid many problems under the Constitution. For example, if integration of public schools runs afoul of no constitutional guaranty then withdrawal of minor-

ity children from those schools "may not be said to have done so" if the reasoning followed below is sound.

> [NOTE: The complete lack of judicial responsibility on the part of both the Tax Court and the Second Circuit in the instant case below can be no better illustrated than to point out that neither of those Courts saw fit to mention (1) the specific terms of the Sixteenth Amendment or (2) the Fourth Circuit's decision in the *Faraco* case dealing directly with constitutionality of the splitting device. The reason for these omissions is obvious: The position taken by the Fourth Circuit in *Faraco* is so astonishingly unsound that no conceivable argument can be made in support of the decision and the terms of the Sixteenth Amendment negate the possibility that a tax penalty may legally be imposed for not being married.]

It is so clear that both historically and actually the concept of equal protection does apply in tax cases that we will not labor the point. See *Heiner* v. *Donnan*, 285 U.S. 312 (1932) and *Moritz* v. *Commissioner, supra.* The Faraco decision in the Fourth Circuit and the *Kellems* decision below are the only cases in which any Court has blatantly asserted that a taxpayer is not entitled to due process and equal protection principles when subject to the grossest kind of ruinous *discriminatory* taxation year after year.

The Second Circuit has mistaken a period of permissiveness on the part of the Courts as though it were an historical concept exempting tax laws from the Constitution and excluding them from due process and equal protection principles. There has unquestionably been too much permissiveness in this field

which has resulted in the absurdity of a taxpayer being penalized by denial of a $600 deduction solely because he has never married, as in the *Moritz* case, *supra,* and the astounding annual 41.7 percent penalty of $3,158.08 against Miss Kellems in this case solely because in the eighth decade of life she is not married. It is the urgent responsibility of this Court to let both the Congress and the Second Circuit know that tax statutes are subject to the Constitution and are not sacrosanct and immune from due process and equal protection principles.

The Tenth Circuit's opinion in the *Moritz* case, *supra,* is a belated but salutary reminder to the Congress that tax laws are subject to constitutional principles just as all other laws. However, the morass of inequities and subsidies in the Internal Revenue Code calls for this Court's positive action *putting Congress on notice that permissiveness in enacting tax statutes is over* and that henceforth thought must be given to the Constitution of the United States and particularly to due process and equal protection when enacting tax laws that pervade every aspect of life in America.

So that there can be no misunderstanding about the nature of the constitutional issue involved, we point out that the splitting device provides maximum tax benefit to those most able to pay, i.e., to the wealthy childless married taxpayer, and provides no benefit to the single taxpayer or low income taxpayer. This was explained over and over by President Truman, Randolph Paul and others as follows (Stip. Par. 9):

(a) In his veto message President Truman stated that the splitting device was "inequitable", granting relief to "the most wealthy families."

(b) Senator Douglas pointed out the "smarting sense of injustice" felt by three quarters of individual taxpayers not benefited.

(c) As recently as September 4, 1969 Assistant Secretary of the Treasury Cohen advised Congress that because of the splitting device the "tax burden on single persons is disproportionately high."

(d) Randolph Paul, late General Counsel of the Treasury Department, spelled out in detail "the obvious injustice", gross inequity, and ruinous effect of the splitting device on the income tax system as follows:

> "A serious loss both of uniformity and of effective progression has resulted from the provision in the Internal Revenue Code which permits taxpayers filing joint returns to compute their tax by dividing their combined income in two, applying the rates applicable to single individuals to each half, and then adding together the taxes on each half. * * *
>
> "The *obvious injustice of taxing a single person with dependents at a higher rate than a married man with the same number of dependents* soon led to the enactment of a third set of rates applicable to so called heads of households.
>
> "These provisions violate the principle that taxpayers with equal taxable incomes should be subject to equal rates of tax. They also result in a serious overall loss of progression.
>
> "The advantage of filing joint returns increases far more than proportionately as income rises. Where the husband is the only income recipient and his taxable income is $100,000 per year, he saves $13,680 by filing a joint return. The saving in the case of a man similarly situated and with taxable income of $5,000 is only $80. Thus, the man with 20 times as much income saves 171 times as much tax. *Income-splitting, as now in effect,*

shifts the tax burden from high to low income taxpayers.

"Another difficulty is that these provisions make it extremely difficult constructively to revise the individual income tax rate structure. Perhaps as much, if not more than any other statutory provisions in the code, income-splitting is responsible for the very high level which obtains in the present rate structure."

(e) Congressman Eberharter correctly stated that the splitting device would "reverse the historic principle of taxation based on ability to pay" and constituted truly "a windfall for the wealthy."

(f) Congressman Sabath characterized the splitting device as a grossly discriminatory feature "to reduce taxes of the wealthy and to preclude the reduction of our national debt" as follows:

"It is to be regretted that the bill has been designated as the 'Revenue Act of 1948.' To cite it as such is misleading. Its proper title should be '*A bill to reduce taxes of the wealthy and to preclude the reduction of our national debt.*'

"The bill proposes to reduce the income taxes, not of the needy persons as my colleague stated, but those of the wealthy people of our Nation who will be benefited. * * *"

(g) The former Speaker of the House of Representatives, Congressman McCormack, pointed out the gross discrimination resulting from this splitting device and its serious consequence to the financial security of the Federal Government as follows:

"The present bill * * * is bad for two reasons: First, *it gives the greatest tax relief to those who need it the least.* It means less than $2 a week reduction in taxes for a $3,000 income to an average American family of four. It means $12.50 a week

> to the average American family of four with a $10,000 income, and it goes up to $2,036 a week for the millionaire. Secondly, the * * * tax bill is bad because the present bill under current income receipts will probably put the country in the red for possibly the year 1949."

The extent of the discrimination dealt with here is so vast that it is difficult to comprehend. For the year 1969 alone the Treasury discloses discrimination of $17.1 billion dollars received as a bonus by the wealthiest married taxpayers and added as a liability to low income taxpayers, single taxpayers, and the National Debt (Ex. 7). Based on Brookings Institution analysis the enormity of the fictitious splitting device discrimination is succinctly stated in "*The Rape of the Taxpayer*" by Stern (Random House, 1973) as follows (p. 120):

> "This is an enormously expensive fiction: even most experts are astonished at its prodigious cost, but according to the Brookings Institution computer analysis, this one feature of the tax law costs the U.S. Treasury *about twenty-one and a half billion dollars every year!* Its bounties, moreover, are dispensed with singular unevenness. When it was enacted, 97 percent of its benefits went to the top 5 percent of the taxpayers. On the other hand, nearly four-fifths of the married couples of the nation were entirely denied its benefactions. While subsequent changes in the tax rates have lessened the lopsidedness, even today Married Couple A, with twenty times the income of Married Couple B, can enjoy ninety-seven times as much tax benefit.[6]

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[6] Built-in self interest of such proportions emphasizes the importance of the late Chief Justice Vinson's admonition as to the necessity for guarding against bias resulting from "purse-interest". *John Hancock Mutual Life Insurance Company* v. *Helvering*, 128 F. 2d. 745, 29 AFTR 711 (CA, D.C. 1942).

In disregard of these indisputable facts, the Tax Court had the temerity to "perceive", contrary to the facts, that the splitting device could have been justified on the basis of capacity to pay! And even more disturbing, the Second Circuit affirmed the Tax Court in a *per curiam* two sentence opinion.

The unprecedented discrimination against those lacking a marital status has actually impoverished millions of citizens. This has come about from the fact that the penalty has been applied against unmarried taxpayers regardless of their responsibilities and dependents as pointed out by Randolph Paul. This has meant that they have been deprived of their investment or "seed" money required to function in our economy. The nature of the discrimination was well stated in the *Indiana Legal Forum*, Volume 4, page 397 (1970) as follows:

> "* * * When a legislative classification involves 'fundamental rights' or 'suspect criteria,' the Supreme Court has held that only a 'compelling government interest' will justify different and unequal legislative treatment.[86] The compelling government interest must also be an interest that may be constitutionally promoted by government, and the Court must be satisfied that a less discriminatory means for accomplishing the legislative objective is not available.[87]
>
> "The criteria for testing the validity of the income tax rate disparity must be the more stringent

[86] E. g., Kramer v. Union School District, 395 U.S. 621 (1969); Shapiro v. Thompson, 394 U.S. 618 (1969); Williams v. Rhodes, 393 U.S. 23 (1969); see Hunter v. Erickson, 393 U.S. 385 (1969) (concurring opinion by Justice Harlan).

[87] See e.g., Kramer v. Union School District, 395 U.S. 621 (1969); Shapiro v. Thompson, 394 U.S. 618 (1969); Williams v. Rhodes, 393 U.S. 23 (1969).

> test of a compelling government interest as the rate disparity affects and penalizes an important area of human rights. The right of a taxpayer to earn and enjoy income must be considered a 'fundamental right' available to all individuals.[88] It must be so considered since the right to earn and enjoy income is fundamental to one's very existence and survival in the United States. Imposing a higher tax rate on single taxpayers deprives them of this fundamental right, as it reduces the net dollars single taxpayers have to spend and effectively deprives them of the right to enjoy earned income.
>
> [88] See Truax v. Raich, 239 U.S. 33 (1915). Cf. Yick Wo v. Hopkins, 118 U.S. 356 (1886)."

Incredibly, the terms of the Sixteenth Amendment itself were totally overlooked by both the Tax Court and the Second Circuit below. The simple language of that Amendment, authorizing "taxes on incomes", is an insurmountable embarrassment to discussion by those who approved the 41.7 percent penalty against Miss Kellems solely because of her lack of marital status.

One can imagine the shocked consternation of Woodrow Wilson and those who supported adoption of the Sixteenth Amendment had it been suggested to them that the amendment would authorize imposition in 1965 of *a 41.7 percent penalty in the amount of $3,158.08 against an unmarried woman approaching the ninth decade of life because of her lack of marital status.* This puts to shame those who thought it was amusing when Mussolini imposed a $25 bachelor tax in Italy against unmarried male citizens prior to World War II because he wanted more sons for his military forces. Mussolini's action was rational and quite understand-

able for a dictator not concerned with constitutional restrictions. We submit that, in contrast to the Mussolini penalty, the penalty against Miss Kellems in this case is wholly irrational and in violation of due process and equal protection principles.

The grossly unfair and unequal treatment imposed against petitioner for her lack of marital status is "illogical to the point of irrationality" and clearly "an affront to justice." *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972) and *Burnet* v. *Wells,* 289 U.S. 670 (1933). Bearing in mind that we are dealing with taxable income only, the penalty is in direct violation of this Court's holding that being either married or single does not "so alter the taxable status of one receiving income as to justify a different measure for the tax." *Hoeper* v. *Tax Commission, supra.*

"Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation." See *Railway Express Agency* v. *New York,* 336 U.S. 106 (1949). There is crying and long overdue need for the requirement that equal treatment be adhered to in the imposition of our Federal income tax laws. The discrimination in this instance certainly offends "the plain standards of common sense." *Hartford S.B.I. & Ins. Co.* v. *Harrison,* 301 U.S. 450 (1937).

Concisely stated, this petition for certiorari should be granted for these reasons:

1. The opinion below is in direct violation of the opinion of this Court in *Hoeper* v. *Tax Commission, supra,* and in direct conflict with the opinion of the Tenth Circuit in *Moritz* v. *Commissioner, supra.* It ignores the guidelines of *O'Malley* v. *Woodrough, supra.*

2. The opinion below approving a 41.7 percent penalty in the amount of $3,158.08 for the year 1965 against this 77 year old female petitioner for not being married *is not authorized by the express or implied terms of the Sixteenth Amendment* and is prohibited by the Fifth, Ninth, Fourteenth and Sixteenth Amendments and Article 1, Section 2, Clause 3 and Article 1, Section 9, Clause 4 of the Constitution. No amount of "classification" or attempted "rationalization" can serve to obscure the illegality of this penalty tax *prohibited and not authorized* by the Constitution.

3. The blatantly biased manner in which this constitutional issue has been avoided, distorted, and misrepresented below calls for the long overdue exercise of this Court's supervisory powers. In the *Faraco* case, *supra,* the Tax Court avoided the issue in its entirety. The Fourth Circuit denounced the issue in *Faraco* as "Harry Truman politics" and held that inasmuch as the tax had originally been applied equally against all individual taxpayers the single taxpayer had no basis of complaint because of being omitted from its *unequal* withdrawal for the benefit of wealthy married taxpayers. The Tax Court in the *Kellems* case first attempted to have the case handled on its Small Claims Calendar from which no appeal could have been taken, then asserted that the case was not a judicial matter and sought to have it summarily dismissed without hearing, refused to permit the customary opening statement, and terminated petitioner's testimony as constituting "legal argument" when she made the simple statement of fact that the Sixteenth Amendment authorizes the taxing of income and not people (Tr. 7-9, 16, and Motion filed with Tax Court Jan. 30, 1970). The Second Circuit's (a) distortion of the issue as though penalty tax on the unmarried status presented a problem similar to

that arising from tax exempt bond interest and capital gains, (b) its insistence that the admitted discrimination involved was justified by the Federal Government on the grounds that such discrimination might conceivably have been brought about by State action, (c) assertion that "historically" courts do not interfere with tax statutes, and (d) its two sentence *per curiam opinion,* require no further comment.

We earnestly ask these two questions:

1. What provision in the Constitution, as amended, authorizes imposition of a 41.7 percent penalty amounting to $3,158.08 against petitioner because of her unmarried status?

2. Is it not a fact that Article 1, Section 2, Clause 3, Article 1, Section 9, Clause 4, and the Fifth, Ninth, Fourteenth and Sixteenth Amendments to the Constitution prohibit such direct and discriminatory penalty taxation against petitioner?

The splitting device has done more harm to more people and more damage to the economy and fiscal stability of the United States than any legislation enacted in this century. It has been the major factor causing even greater disparity now between the affluent and the poor than existed during the depression of the 1930's. It transgresses both the principles of common honesty and fair dealing and of due process and equal protection in flagrant mistreatment of a helpless minority. Because of such callous, discriminatory injustice perpetrated by those most able to pay against low income and unmarried taxpayers, no provision has done more to lower standards and create disrespect for government. We respectfully submit that there has never

been a case in the tax field that more urgently requires this Court's attention.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID R. SHELTON
Munsey Building
Washington, D. C. 20004
Counsel for Petitioner

June , 1973

APPENDIX

APPENDIX

58 T. C. No. 56

UNITED STATES TAX COURT

VIVIEN KELLEMS, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

Docket No. 427-70. Filed June 27, 1972.

Petitioner, a single person, computed her tax on the basis of sec. 1(a)(2), I.R.C. 1954, as applicable to the year 1965. *Held:* The application of single return rates, without the income-splitting benefit of sec. 2(a), to petitioner's taxable income was not a violation of petitioner's constitutional rights under the fifth, ninth, fourteenth, and sixteenth amendments or article 1, section 2, clause 3, and article 1, section 9, clause 4 of the United States Constitution.

David R. Shelton, for the petitioner.

David M. Reizes and *Barry D. Gordon,* for the respondent.

WITHEY, *Judge:* Respondent determined a deficiency in Federal income tax for petitioner for the year ended December 31, 1965, in the amount of $813.30. Respondent has also denied petitioner's claim for refund of taxes for the same year in the amount of $2,939.13. The issues raised by way of the notice of deficiency having been conceded by petitioner at the time of trial, the remaining issue is the allowability of petitioner's claim for refund which is based upon the assertion that the computation of petitioner's tax through the use of rates applicable to single persons rather than married persons constituted an unconstitutional classification.

Findings of Fact

Petitioner, a single person from 1947 to the time of trial of this case, resided at East Haddam, Connecticut, at the time of filing the petition. Both petitioner's 1965 individual return and claim for refund were filed with the district director of internal revenue, Hartford, Connecticut.

The tax on petitioner's return, as filed, was computed by petitioner on the basis of the rates set forth in section 1(a)(2) of the Internal Revenue Code of 1954 as amended through 1965.

Opinion

Having conceded the only issue with regard to the notice of deficiency, petitioner claims entitlement to a refund of income tax paid for 1965. The basis for petitioner's claim is that the provisions of the Internal Revenue Code providing a rate of tax applicable to petitioner, who is a single person, higher than the rate applicable to joint returns of married persons are unconstitutional and in violation of the fifth, ninth, fourteenth, and sixteenth amendments and article 1, section 2, clause 3, and article 1, section 9, clause 4 of the United States Constitution.[1]

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[1] The relevant sections of the Internal Revenue Code, as amended through Public Law 88-272, February 26, 1964, were as follows:

> Sec. 1(a)(2). * * * In the case of a taxable year beginning after December 31, 1964, there is hereby imposed on the taxable income of every individual (other than a head of a household to whom subsection (b) applies) a tax determined in accordance with the following table:
>
> * * * * * * * *
>
> | | |
> |---|---|
> | Over $14,000 but not over $16,000 | $3,550 plus 39% of excess over $14,000 |
>
> * * * * * * * *
>
> | | |
> |---|---|
> | Over $26,000 but not over $32,000 | $9,030 plus 53% of excess over $26,000 |
>
> * * * * * * * * *

Petitioner's argument with respect to the ninth and sixteenth amendments and with respect to the first article of the Constitution is apparently that the amount of tax paid by her in excess of that which would be payable if joint rates were applied to her income is not an income tax, and also is not a tax which is apportioned among the states. This argument, predicated on the assertion that the "excess" is a penalty for remaining single, and not an income tax, is without merit. No evidence has been submitted showing the intent of Congress was to regulate or restrict or penalize persons who are not married.

Although the fourteenth amendment is generally applicable to states rather than to the Federal government, the fourteenth amendment concept of equal protection has been held in certain nontax situations to be applicable to the United States through the fifth amendment. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954); *Shapiro* v. *Thompson*, 394 U.S. 618, 642 (1969). Without specifically stating that equal protection was an essential part of the fifth amendment in cases involving classifications within the Internal Revenue Code, the Supreme Court has set forth the standard for judicial review of classifications within the Internal Revenue Code in *United States* v. *Maryland Savings-Share Ins. Corp.*, 400 U.S. 4 (1970), a case in which the equal

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Sec. 2(a). Rate of Tax. In the case of a joint return of a husband and wife under section 6013, the tax imposed by section 1 shall be twice the tax which would be imposed if the taxable income were cut in half * * *

After giving effect to the increase in petitioner's income asserted in respondent's notice of deficiency, the Federal income tax applicable to petitioner's 1965 income under the provisions of section 1(a)(2) (shown above) is $10,726.34. If the "income splitting" provision of section 2(a) (shown above) were applicable to the same income, the tax would be $7,568.26; the difference between the two amounts is $3,158.08, which is a 41.7 percent increase from $7,568.26, or a 29.4 percent reduction from $10,726.34, depending on the reader's perspective.

protection argument was made by the taxpayer. In that case the Court stated:

> Normally, a legislative classification will not be set aside if any state of facts rationally justifying it is demonstrated to or perceived by the courts. *McDonald* v. *Board of Election Comm'rs*, 394 U.S. 802, 809 (1969), *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961), *Standard Oil Co.* v. *City of Marysville*, 279 U.S. 582, 586-587 (1929). • • •

Petitioner's central argument thus hangs on the issue of whether this Court "perceives" a rational basis for the distinction drawn between married and single persons for purposes of the applicable rates of taxation. We do perceive such a basis.

This distinction was drawn for the first time by section 301 of the Revenue Act of 1948, 62 Stat. 114, and has remained a part of the Code since then. Legislative history discloses congressional intent in the enactment of the provision to be the geographic equalization of tax treatment of taxpayers.[2] This equalizing provision was meant to forestall a substantial and immediate trend by state governments adopting community property laws. The anticipated community property laws were expected by Congress to produce revenue losses equivalent in magnitude to the revenue loss caused by the enactment of the bill[3] and at the same time cause serious disruption in state and Federal government.[4] Congress felt it could not directly attack the effect of community property laws in light of the decision of *Poe* v. *Seaborn*, 282 U.S. 101 (1930).[5] The effect of the

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[2] H. Rept. No. 1274, 80th Cong., 2d Sess. (1948), 1948-1 C.B. 241, 260.

[3] Ibid. at 261.

[4] Ibid. at 259.

[5] Ibid. at 257.

1948 Act was to provide equality of treatment to persons who were married whether or not living in a community state.

Petitioner argues that issue is not taken with the wisdom of the enactment of the split-income device to frustrate the anticipated state community property laws, but rather issue is taken with the denial of the benefit of the split-income device to single persons. We perceive two justifications to what was done by Congress in this respect. First, it is reasonable for Congress to attempt to achieve geographic equality. The means chosen to meet that end was reasonable in spite of the unequal treatment of single people since there were no viable alternative methods available to Congress to leave *all* taxpayers equal. Inequality remained if the income-splitting device were extended to *all* individual returns of both married and single persons, since then married persons in community property states filing individual returns would still be better off than persons married or single outside of community property states; nor would equality be achieved if the income-splitting device were extended only to single persons and married persons filing joint returns, because then a single person would pay a much lower tax than the tax paid by a married person who filed a separate return. Furthermore a single person would also pay a tax lower than the effective tax on the same income of a married person whose spouse also had significant income (both of whose incomes were included on a joint return).

More importantly, however, Congress was within the bounds of its constitutional role since it is conceivable Congress believed that married persons generally have greater financial burdens than single persons.[6] The recognition of such greater burdens is certainly consonant

[6] It need not be demonstrated that Congress actually considered such a state of facts as long as the facts are perceptible to the Court. See *Maryland Savings-Share, supra.*

with taxation based on the ability to pay, which has long been an important objective of the income tax scheme. The degree of recognition given by Congress to the problem of greater financial burdens on the part of the married taxpayers (see footnote 1, *supra*) was also within the discretion of Congress since it does not appear arbitrary or unreasonable. Furthermore, the fact that the income-splitting device grants the greatest amount of tax reduction to those earning high incomes simply reflects the graduated rate structure of the Internal Revenue Code. This factor in no way negates the idea that the provision was an acknowledgment of the greater financial burdens of married persons since in any given income category the married person filing jointly will pay less tax than a single person having the same income.[7]

Petitioner's faith in *Hoeper* v. *Tax Commission*, 284 U.S. 206 (1931), and similar cases is misplaced. In *Hoeper* the Court was dealing with a Wisconsin income tax statute which added a wife's earnings to her husband's taxable income. That Court stated at page 217, "It can hardly be claimed that a mere difference in social relations so alters the taxable status of one receiving income as to justify a different measure for the tax." The distinction between *Hoeper* and the present case is that in *Hoeper* the state was attempting to tax to the husband earnings which were not his, whereas in this case Congress is applying a different rate of tax to earnings conceded to be petitioner's. It is fully within the power of Congress to enact provisions reducing or modifying the effect of the graduated rates, subject to the restriction discussed above; that is, if the change in the rate structure is not equal as between classes of taxpayers, there must be a rational basis for the distinc-

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[7] It is worth noting that as the married person's spouse has an increasing amount of separate income, the "tax reduction" due to "income splitting" diminishes, reaching zero when the two incomes are equal.

tion. In this case the geographic equalization of taxpayers as between community and non-community states and the recognition of the greater financial burdens of married persons provide such rational basis.

Decision will be entered for the respondent.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 402—September Term, 1972.

(Argued April 3, 1973 Decided April 4, 1973.)

Docket No. 72-2122

VIVIEN KELLEMS, *Appellant*.

v.

COMMISSIONER OF INTERNAL REVENUE, *Appellee*.

Before:

KAUFMAN, ANDERSON and OAKES, *Circuit Judges*.

Appeal from a decision of the United States Tax Court, Withey, Judge, holding that application of single return rates, without the income-splitting benefit of sec. 2(a) of the Internal Revenue Code of 1954, did not violate appellant's constitutional rights.

Affirmed.

David R. Shelton, Esq., Washington, D.C., for Appellant.

Stephen Schwartz, Esq., Tax Division, Department of Justice, Washington, D.C. (Scott P. Crampton, Assistant Attorney General, Meyer Rothwacks, Esq., Leonard J. Henzke, Jr., Esq., Tax Division, Department of Justice, Washington, D.C.), for Appellee.

PER CURIAM:

The judgment is affirmed on the basis of the Tax Court's opinion below. We find *Moritz* v. *Commissioner*, 469 F.2d 466 (10 Cir. 1972), cited to us by appellant, to be inapposite.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourth day of April one thousand nine hundred and seventy-three.

Present:

HON. IRVING R. KAUFMAN
HON. ROBERT P. ANDERSON
HON. JAMES L. OAKES
Circuit Judges.

72-2122

VIVIEN KELLEMS, *Petitioner-Appellant,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent-Appellee.*

Appeal from The Tax Court of the United States

This cause come on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said Tax Court of the United States be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

At a stated term of the United States Court of Appeals in and for the Second Circuit held at the United States Court House, in the City of New York in the first day of May one thousand nine hundred and seventy-three.

Docket No. 72-2122

Present:

HON. IRVING R. KAUFMAN
HON. ROBERT P. ANDERSON
HON. JAMES L. OAKES
Circuit Judges.

VIVIEN KELLEMS, *Petitioner-Appellant,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent-Appellee.*

A Petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ A. DANIEL FUSARO
Clerk

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

U. S. Constitution:

ARTICLE 1, Section 2, Clause 3:

> "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."

ARTICLE 1, Section 9, Clause 4:

> "No Capitation, or other direct, Tax shall be laid unless in Proportion to the Census or Enumeration herein before directed to be taken."

Fifth Amendment:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Ninth Amendment:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Fourteenth Amendment, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Sixteenth Amendment:

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

Internal Revenue Code of 1954, as amended to 1965:

"SEC. 1. TAX IMPOSED.

"(a)(2). * * * In the case of a taxable year beginning after December 31, 1964, there is hereby imposed on the taxable income of every individual (other than a head of household to whom subsection (b) applies) a tax determined in accordance with the following table:

* * *

"Over $14,000 but not over $16,000	$3,550 plus 39% of excess over $14,000

* * *

"Over $26,000 but not over $32,000	$9,030 plus 53% of excess over $26,000"

"SEC. 2. TAX IN CASE OF JOINT RETURN OR RETURN OF SURVIVING SPOUSE.

"(a) Rate of Tax.—In the case of a joint return of a husband and wife under section 6013, the tax imposed by section 1 shall be twice the tax which would be imposed if the taxable income were cut in half. For purposes of this subsection, section 3, and section 141, a return of a surviving spouse (as defined in subsection (b)) shall be treated as a joint return of a husband and wife under section 6013."

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1708

VIVIEN KELLEMS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, an unmarried taxpayer, brought this action in the United States Tax Court challenging the constitutionality of the "income-splitting" provisions of Sections 1 and 2 of the Internal Revenue Code of 1954, 26 U.S.C. (1964 ed.) 1 and 2, principally on the ground that the resulting differential between the effective tax rates imposed on single individuals and married persons filing joint returns amounts to a denial of equal protection of the law. The Tax Court upheld the statute as constitutional (Pet. App. 1a-7a) and the court of appeals affirmed *per curiam* (Pet. App. 7a-8a). Petitioner renews her constitutional challenge here.

1. Prior to 1948, married individuals in community property states, unlike married persons living elsewhere, were entitled to divide their incomes between them for federal income tax purposes and thereby achieve, due to the operation of the progressive rate structure, a

reduction in their total tax liabilities. Compare *Poe* v. *Seaborn*, 282 U.S. 101, with *Lucas* v. *Earl*, 281 U.S. 111. Statutory income-splitting was enacted to correct this disparity of income tax treatment based solely upon state of residence, a disparity inconsistent with fundamental principles of federalism. See H. Rep. No. 1274, 80th Cong., 2d Sess. 21-24; S. Rep. No. 1013, 80th Cong., 2d Sess. 22-25. Cf. *Fernandez* v. *Weiner*, 326 U.S. 340. This objective alone provided ample reasonable legislative basis for the statute petitioner challenges, and the statute has previously been sustained against constitutional challenges. *Faraco* v. *Commissioner*, 261 F. 2d 387 (C.A. 4), certiorari denied, 359 U.S. 925.

Moreover, Congress cannot be said to have acted unreasonably in treating a husband and wife as if in fact their joint incomes were shared between them. Congress could reasonably assume that a married couple functions as an economic unit and may be most appropriately taxed as if each spouse contributes jointly to the production of income. Furthermore, as the Tax Court noted, Congress could have reasonably concluded that "married persons generally have greater financial burdens than single persons" (Pet. App. 5a) and "[t]he recognition of such greater burdens is certainly consonant with taxation based on ability to pay" (Pet. App. 5a-6a).

To be sure, the income-splitting device may foster some disparities. But "[n]o scheme of taxation * * * has yet been devised which is free of all discriminatory impact." *San Antonio Independent School District* v. *Rodriguez*, No. 71-1332, decided March 21, 1973, slip op. 37. Because of the progressive rate structure and the problem posed by community property laws, any rule will appear to penalize married couples in some cases or to impose greater tax burdens on single persons in others. Given the inherent complexity of the problem, the taxing scheme adopted by Congress in 1948 and refined in a series

of subsequent reforms,[1] while not perfect, nonetheless satisfies the requirements of due process and equal protection.

2. Petitioner argues (Pet. 5, 7, 21) that the decision below conflicts with *Moritz* v. *Commissioner*, 469 F. 2d 466 (C.A. 10), certiorari denied, No. 72-1298, May 21, 1973. There is no conflict. *Moritz* involved a constitutional challenge to Section 214 of the Code which, prior to 1972, allowed a limited deduction, for expenses incurred in the care of dependents, to "a taxpayer who is a woman or widower, or * * * a husband whose wife is incapacitated or is institutionalized," but did not allow such a deduction to a man who had never married. In extending the benefits of Section 214 to unmarried males, the Tenth Circuit reasoned that the statute "made a special discrimination premised on sex alone, which cannot stand." 469 F. 2d at 470.[2] Cf. *Frontiero* v.

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[1] Over the years, some of the benefits of income-splitting have been granted to single taxpayers who qualify as a "head of household" (Section 1(b)(2)) or a "surviving spouse" (Section 2(b)(1)). Moreover, the rate structure applicable to the year here in issue was revised substantially by the Tax Reform Act of 1969, P.L. 91-172, 83 Stat. 487. Section 1(c) of the Code now provides a new, lower rate schedule for unmarried individuals to insure that the tax paid by a single person will never be more than 20 percent greater than that paid by a married couple with the same taxable income. As a result of these reforms, however, new disparities have arisen; for example, the total tax liability of two single persons who earn similar amounts of income is now less than that of a married couple with the same aggregate income. Congress is continuing to re-examine the problem. See Hearing on Tax Treatment of Single Persons and Married Persons Where Both Spouses Are Working, before the House Committee on Ways and Means, 92d Cong., 2d Sess.

[2] Petitioner erroneously states (Pet. 7, n. 4) that the male taxpayer in *Moritz* was the victim of a classification "based solely on his lack of marital status." Had Mr. Moritz been married, he would not have been allowed to deduct the expenses

Richardson, No. 71-1694, decided May 14, 1973; *Reed* v. *Reed,* 404 U.S. 71. Since the income-splitting provisions of the federal tax rate structure do not discriminate on the basis of sex, the reasoning in *Moritz,* as the court of appeals correctly concluded (Pet. App. 8a), is "inapposite."

Petitioner also mistakenly asserts a conflict (Pet. 5, 7, 9) with *Hoeper* v. *Tax Commission,* 284 U.S. 206. The issue in *Hoeper* was the constitutionality of requiring a husband to report as his own the income of his wife over which he had no title or control. The issue petitioner raises is entirely different. Moreover, it is clear here that petitioner was taxed only on income actually belonging to her, and therefore that her claim that her tax was invalid under the Sixteenth Amendment is without merit.[3]

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.

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for the care of his aged mother unless his wife was incapacitated or institutionalized. Had he been a woman, however, the expenses would have been deductible provided they were incurred to enable the taxpayer to be gainfully employed.

[3] Petitioner's argument under the Sixteenth Amendment is apparently premised on the belief that she is paying a penalty for not being married, *i.e.,* that a portion of her tax is on not her income but her single status. But it is not even clear that petitioner would pay lower taxes if she were married; indeed, the net tax on her own income would be higher if she married a man who himself had a substantial income.

No. 72-1708

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

VIVIAN KELLEMEN, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF TO RESPONDENT'S MEMORANDUM IN OPPOSITION

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INDEX OF CITATIONS

Page

CASES:

Faraco v. *Commissioner*, 261 F.2d 387 (CA 4, 1958), cert. den. 359 U.S. 925 (1959) 3, 4

Hoeper v. *Tax Commission*, 284 U.S. 206 (1931) 5

Moritz v. *Commissioner*, 469 F.2d 466 (1972), cert. den. May 21, 1973 2

Poe v. *Seaborn*, 282 U.S. 101 (1930) 4

San Antonio Independent School District v. *Rodriguez*, 411 U.S. 1 (1973) 2

Savings & Loan Association v. *Topeka*, 87 U.S. 655 (1875) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1708

VIVIEN KELLEMS, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY BRIEF TO RESPONDENT'S MEMORANDUM IN OPPOSITION

The Government's Memorandum in Opposition to certiorari seeks to gloss the constitutional issue and divert attention from its importance.

This case involves the constitutionality of a 41.7% penalty tax in the amount of $3,158.08 imposed for 1965 against the 77 year old petitioner *solely because*

she was not married. This constitutional issue arises under provisions of the Internal Revenue Code providing annual bonuses ranging up to $17.1 billion dollars to $21.5 billion dollars[1] for those most able to pay with the burden of those bonuses *added to the liabilities of all low income taxpayers, all single taxpayers, and the National Debt.*

In light of the Supreme Court's position in *Savings & Loan Association* v. *Topeka*,[2] it is clear this case presents penalties of enormous proportions against the single taxpayer in disregard of due process and equal protection principles. Yet, the Government seeks to obscure the issue by conceding that "the income-splitting device may foster disparities" comparable to school taxes dealt with in *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973). The enormity of the invidious discrimination against the single and low income taxpayer and the raid against the Treasury, totalling more than $300 billion dollars, carried out under the income splitting device should not be minimized as comparable to property tax rates for school districts.

Doesn't it seem strange that a few weeks ago the Government requested certiorari in the *Moritz* case[3] but now opposes certiorari in the instant case? The *Moritz* case involved a $600 *deduction* denied to a single man in a highly isolated situation that could not be expected to affect wealthy taxpayers or have an impact of more than a few thousand dollars on the

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[1] Petition for Certiorari, pp. 4, 18

[2] 87 U.S. 655 (1875).

[3] 469 F.2d 466 (1972), cert. den. May 21, 1973.

Treasury. In the instant Kellems case the penalties imposed against her for being single have already amounted to more than $90,000, inclusive of interest. The cost of the splitting device to the Treasury has been up to $21.5 billion dollars annually. It has added more than $300 billion dollars to the National Debt. Its impact on tens of millions of low income and single taxpayers has been both unconscionable and devastating. It has resulted in greater disparity between the rich and the poor than existed 40 years ago. Under these circumstances it would seem that both consistency and concern for the welfare of the United States would have prompted the Solicitor General to join in requesting certiorari.[4]

Unlike the Courts below, which did not see fit to mention the *Faraco* case,[5] the Memorandum in Opposition boldly relies upon that case. There can be no better reason for granting certiorari than the utter disregard of constitutional rights encompassed by that decision. The Court of Appeals regarded as "slight" a 40.37% annual penalty against Mrs. Faraco because her husband died and concluded as follows:

> "* * * The fact that the change gave a proportionately greater tax reduction to married couples with large incomes is wholly irrelevant; if the rapid acceleration of the progressive tax rates ran afoul of no constitutional guaranty, a slight withdrawal may not be said to have done so."

The above principle stated in *Faraco*, though patently unsound, is the theory on which the Courts

[4] See Statement of Randolph Paul, Petition for Certiorari, p. 16.

[5] *Faraco* v. *Commissioner*, 261 F.2d 628, 2 AFTR 2d 6122 (CA 4, 1958), cert. den. 359 U.S. 925 (1959).

have proceeded below. The position taken in the instant Kellems case can be sustained only if it is constitutionally permissible, as held in *Faraco*, for tax rates *equally* applied to all to be withdrawn *unequally* in favor of those most able to pay. A principle so unfair, so clearly unsound, and in such direct violation of constitutionally protected rights clearly requires consideration by this Court.

In its brief to the Second Circuit, the Government asserted and the Court agreed that the Sixteenth Amendment authorizes "governmental regulation in the social and economic field" and *empowers Congress "to regulate, restrict or penalize single persons through higher tax rates on their income"* if it chooses to do so (Brief pp. 11 and 22). In less harsh terms, the Solicitor General's Memorandum in Opposition takes the same position. We submit that *the Government's position is monstrously wrong.* Does the plain language of the Sixteenth Amendment empower Congress to "regulate, restrict or penalize single persons through higher tax rates" for being unmarried? Such claimed scope and purpose for the Sixteenth Amendment empowering Congress "to lay and collect taxes on incomes" is so shockingly improper as to obviously require the attention of this Court.

The Memorandum in Opposition continues to utilize *Poe* v. *Seaborn*, 282 U.S. 101 (1930), dealing with vested property rights to obscure the true nature of the constitutional issue in this case. What right did the Congress have to heavily penalize single taxpayers while allegedly correcting a comparatively slight disparity between married taxpayers in common law and community property states? *Are not single taxpayers covered by the same Constitution that protects married*

taxpayers? What provision of the Constitution empowers Congress to impose penalties in excess of 40% on unmarried taxpayers while granting tax reduction of up to more than 40% to wealthy married taxpayers? As pointed out in our petition for certiorari there is no conceivable reason for not granting the splitting device to the single taxpayer just as it was granted to the married taxpayer and to the widowed single taxpayer.

The Memorandum in Opposition ignores the fact that in *Hoeper* v. *Tax Commission*, 284 U.S. 206 (1931), the Supreme Court squarely held that being married or single does not "so alter the taxable status of one receiving income as to justify a different measure for the tax." That holding is in direct conflict with the decision below. The suggestion that the case may be distinguished on the ground that in *Hoeper* the husband had no control over the income is misplaced. Mr. Justice Holmes' dissenting opinion expressly pointed out that the husband had "actual enjoyment of the property taxed" and "would get the benefit of the income of each without inquiry into the source." The only substantive difference between *Hoeper* and the instant case is that the tax of a *married* man was increased in *Hoeper* and the tax of a *single woman* increased in this case. That, we submit, is not grounds for a constitutional distinction.

It is further suggested that Congress could have based the splitting device on "ability to pay". The absurdity of this assertion is equaled only by its lack of candor. The splitting device was designed solely for the benefit of the wealthy, with maximum benefit going to the childless married taxpayer having the greatest ability to pay. See statements of President

Truman, Senator Douglas, Assistant Secretary of the Treasury Cohen, Randolph Paul, Congressman Eberharter, Congressman Sabath, Speaker of the House McCormack, and Brookings Institution Computer Analysis set forth in *The Rape of the Taxpayer*, at pages 15-18 of Petition for Certi i.

Because she is single, petition s been discriminated against with callous disregard of due process and equal protection principles. The "smarting sense of injustice" described by Senator Douglas has now reached the point of a deep sense of outraged despair by millions of single taxpayers. The constitutional issue involved is of fundamental and transcendent importance meriting the highest priority for consideration by this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

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